

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-01347-COA

EDDIE JAMES CARTHAN

APPELLANT

v.

**ZULA PATTERSON, MAYOR OF THE TOWN
OF TCHULA, MISSISSIPPI AND THE TOWN OF
TCHULA, MISSISSIPPI**

APPELLEES

DATE OF JUDGMENT:	07/12/2012
TRIAL JUDGE:	HON. KENNETH L. THOMAS
COURT FROM WHICH APPEALED:	HOLMES COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	CARLOS DIALLO PALMER
ATTORNEYS FOR APPELLEES:	DANIEL JUDSON GRIFFITH MICHAEL STEPHEN CARR
NATURE OF THE CASE:	CIVIL - OTHER
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT GRANTED IN FAVOR OF APPELLEES
DISPOSITION:	AFFIRMED - 03/11/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

LEE, C.J., FOR THE COURT:

¶1. The mayor and Board of Aldermen (Board) of the Town of Tchula, Mississippi, determined that a warehouse owned by Eddie James Carthan was a public nuisance and voted to demolish the warehouse. Carthan filed suit in the Holmes County Circuit Court against the mayor and the Town, claiming the destruction of his property was an unconstitutional taking. Finding it had no jurisdiction, the trial court dismissed Carthan's suit.

FACTS

¶2. On April 21, 2006, Carthan received notice from the mayor that a hearing was to be

held concerning the condition of his warehouse, which was located at 907 Main Street. During a meeting on June, 8, 2006, the Board found Carthan's warehouse to be a public nuisance and voted to move forward with the demolition. On June 16, 2006, Carthan delivered a letter to the mayor and the Board in which Carthan stated his intent to appeal. The letter was stamped as received that same day. At a meeting on July 13, 2006, Carthan attempted to discuss the demolition of his warehouse, but the Board's attorney stated the issue was not on the agenda. Five days later, municipal employees demolished Carthan's warehouse.

¶3. On May 6, 2008, Carthan filed suit against the Town alleging an unconstitutional taking of his property without just compensation and a deprivation of property without due process of law. The Town filed a motion for summary judgment. The trial court granted the Town's motion, finding it did not have jurisdiction over the matter since Carthan failed to perfect his appeal from the Board's decision of June 8, 2006. The trial court determined that Carthan's letter dated June 16, 2006, was not sufficient to perfect an appeal since Carthan failed to file a bill of exceptions, as required by Mississippi Code Annotated section 11-51-75 (Rev. 2012). Carthan now appeals the trial court's ruling.

DISCUSSION

¶4. Carthan contends he perfected his appeal of the Board's decision on June 8, 2006, by delivering his notice of appeal and "letter of exceptions" within ten days, as required by section 11-51-75.

¶5. Section 11-51-75 states the requirements for appeals to circuit court from municipal authorities as follows:

Any person aggrieved by a judgment or decision of the board of supervisors, or municipal authorities of a city, town, or village, may appeal within ten (10) days from the date of adjournment at which session the board of supervisors or municipal authorities rendered such judgment or decision, and may embody the facts, judgment[,] and decision in a bill of exceptions which shall be signed by the person acting as president of the board of supervisors or of the municipal authorities. The clerk thereof shall transmit the bill of exceptions to the circuit court at once, and the court shall either in term time or in vacation hear and determine the same on the case as presented by the bill of exceptions as an appellate court, and shall affirm or reverse the judgment.

¶6. “The act of a municipality which leaves a party aggrieved is appealable to the circuit court where all of the issues of the controversy are finally disposed of by order of the municipal authorities.” *McPhail v. City of Lumberton*, 832 So. 2d 489, 491 (¶7) (Miss. 2002) (citation omitted). The ten-day requirement “is both mandatory and jurisdictional.” *Id.* at 492 (¶8) (citation omitted). Thus, “when an appeal . . . is not perfected within the statutory time constraint of ten days, no jurisdiction is conferred upon the appellate court, i.e., the circuit court.” *Id.*

¶7. Carthan did file a letter within ten days of the Board’s decision. The letter was addressed to the mayor and the Board and stated as follows:

In accordance [with] the ordinances and codes of the [Town] of Tchula and the State of Mississippi and the 14th Amendment of the U.S. Constitution, I hereby appeal the recent decision of the [m]ayor and [the Board] at their June 8, 2006[] hearing and meeting concerning my property (warehouse) located . . . at . . . 907 Main Street, Tchula, MS.

Given the many discrepancies, errors, inaccuracies[,] and unlawful procedures in handling this matter, I strongly request that another meeting be held in which professional[s] and experts may address the above matter or an appropriate court . . . may intervene.

¶8. The trial court stated that:

One may be strained to find the letter . . . may serve as [a] notice of appeal, but

the letter is not sufficient to serve as a bill of exceptions, which is a significant part of the appeal process. [Carthan] has failed to list any discrepancy, error, inaccuracy, or unlawful procedure that was made or used by the [T]own of Tchula.

¶9. Although Carthan contends his letter serves as a proper bill of exceptions, we disagree. The purpose of the bill of exceptions is to serve as the record on appeal; thus, the trial court “may only consider the case as made by the bill of exceptions.” *Wilkinson Cnty. Bd. of Supervisors v. Quality Farms Inc.*, 767 So. 2d 1007, 1011 (¶11) (Miss. 2000). “If the bill of exceptions is not complete and is fatally defective in that pertinent and important facts and documents are omitted therefrom, then the court does not have a record upon which it can intelligently act.” *Stewart v. City of Pascagoula*, 206 So. 2d 325, 328 (Miss. 1968). “A proper bill of exceptions on appeal is necessary to confer jurisdiction on the appellate court.” *Id.* See also *McKee v. City of Starkville*, 97 So. 3d 97, 100 (¶9) (Miss. Ct. App. 2012); *Pruitt v. Zoning Bd. of City of Laurel*, 5 So. 3d 464, 469 (¶16) (Miss. Ct. App. 2008).

¶10. We reiterate that this case does not involve the direct appeal of the Board’s decision, but rather an independent action against the Town alleging an unconstitutional taking. In *McPhail*, McPhail failed to properly appeal the decision of a local board pursuant to section 11-51-75. *McPhail*, 832 So. 2d at 492 (¶9). Like Carthan, McPhail filed a separate lawsuit against the municipality well after the local board’s decision. *Id.* at 491 (¶7). The Mississippi Supreme Court found that section 11-51-75 operated as a jurisdictional bar since McPhail failed to properly appeal the board’s decision to the circuit court; thus, the separate claim was not properly before the circuit court. *McPhail*, 832 So. 2d at 492 (¶11).

¶11. Carthan failed to comply with section 11-51-75 by not embodying the facts and

proceedings below in a proper bill of exceptions. In failing to do so, Carthan failed to perfect his appeal. Thus, section 11-51-75 operated as a jurisdictional bar to Carthan's separate claim. We find the trial court correctly determined it was without jurisdiction.

¶12. THE JUDGMENT OF THE HOLMES COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

GRIFFIS, P.J., BARNES, ISHEE, ROBERTS, CARLTON, MAXWELL AND FAIR, JJ., CONCUR. JAMES, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY IRVING, P.J.

JAMES, J., DISSENTING:

¶13. I find that summary judgment was entered in error; therefore, I respectfully dissent. The standard of review of a trial court's grant or denial of a motion for summary judgment is de novo. *Parmenter v. J&B Enters. Inc.*, 99 So. 3d 207, 213 (¶7) (Miss. Ct. App. 2012). Under Rule 56(c) of the Mississippi Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether summary judgment was properly granted by a trial court, we view "the facts in the light most favorable to the nonmovant." *Parmenter*, 99 So. 3d at 213 (¶7). "The burden of demonstrating that there are no genuine issues of material fact is upon the movant, and the non-moving party must be given the benefit of every reasonable doubt." *Id.*

¶14. The mayor and Board determined that a warehouse owned by Dr. Carthan, a former mayor, was a public nuisance and ordered the demolition and removal of the warehouse. On May 6, 2008, Carthan filed a lawsuit in the Circuit Court of Holmes County against the

mayor and town alleging an unconstitutional taking of property without just compensation in violation of Article 3, Section 17 of the Mississippi Constitution, and a deprivation of property without due process of law.

¶15. The majority states that Carthan failed to perfect his appeal; therefore, the circuit court lacked jurisdiction. Carthan filed his notice of appeal on June 16, 2006, pursuant to Mississippi Code Annotated section 11-51-75 (Rev. 2012). Unlike the appellant in *McPhail v. City of Lumberton*, 832 So. 2d 489, 491 (¶7) (Miss. 2002), Carthan’s notice of appeal was filed within ten days. Therefore, *McPhail* does not operate as a jurisdictional bar based upon the facts here. The circuit court found that Carthan’s letter, although sufficient to serve as a notice of appeal, did not constitute a proper bill of exceptions. Section 11-51-75 has been interpreted “to require the filing of an appeal within ten days, but [allows] the bill of exceptions to be filed or amended within a reasonable time thereafter.” *Tilghman v. City of Louisville*, 874 So. 2d 1025, 1026 (¶7) (Miss. Ct. App. 2004). Furthermore, “a circuit court, sitting as an appellate court, enjoys the same authority as the Mississippi Supreme Court or Court of Appeals to remand a case to an inferior body for record supplementation or a factual determination while at the same time retaining jurisdiction over both the parties [and] the subject matter.” *Howell v. Bd. of Sup’rs of Jefferson Davis Cnty.*, 70 So. 3d 1148, 1154 (¶18) (Miss. Ct. App. 2011). Therefore, although Carthan’s letter merely articulated his statement of exceptions, he should have been permitted to amend his statement to conform to a proper bill of exceptions. The majority cites *Wilkinson County Board of Supervisors v. Quality Farms Inc.*, 767 So. 2d 1007 (Miss. 2000), for the proposition that the circuit court may only consider the case as made in the bill of exceptions. There, however, the supreme court, after

finding that the bill of exceptions was fatally defective, reversed and remanded to “allow the parties to file a proper amended bill of exceptions.” *Id.* at 1012 (¶15); *see also Fields v. City of Clarksdale*, 27 So. 3d 464, 468 (¶10) (Miss. Ct. App. 2010).¹

¶16. This Court has held that filing a notice of appeal is sufficient to vest jurisdiction. *Bowen v. DeSoto Cnty. Bd. of Sup'rs*, 852 So. 2d 21, 24 (¶9) (Miss. 2003). The Board did not respond to Carthan’s notice of appeal, nor did it transmit the notice to the circuit court. Carthan then appeared before the Board on July 13, 2006, but the Board refused to consider the matter because it was not on the agenda. The Board then proceeded to demolish Carthan’s warehouse, disregarding his appeal.

¶17. Furthermore, although Carthan’s letter was insufficient to constitute a proper bill of exceptions, the appeal became moot upon the demolition of his warehouse. Thus, Carthan’s only avenue of redress was filing suit based on a denial of due process. To now hold that no jurisdiction exists would penalize Carthan for the Board’s failure to respond to his appeal and reward the Board for proceeding to demolish Carthan’s property and foreclosing the pending appeal. In sum, Carthan would be left with no avenue of redress. Although, the majority properly notes that the procedural requirements of section 11-51-75 are both mandatory and jurisdictional, “the statutory indications are that the legislative branch does not wish that matters of form will terminate a court's ability to consider the rights of parties.” *Bowen*, 852 So. 2d at 24 (¶7) (citing *Bowling v. Madison Cnty. Bd. of Sup'rs*, 724 So. 2d 431, 442 (¶50)

¹ The Mississippi Rules of Appellate Procedure were adopted effective January 1, 1995; and, the Uniform Rules of Circuit and County Court were adopted effective May 1, 1995, which greatly affected appeals to circuit court.

(Miss. Ct. App. 1998)). I find that there is substantial indication in the record that Carthan's rights may have been violated by the Board when it failed to act on his appeal and proceeded to demolish his warehouse. Thus, I find genuine issues of material fact present indicating that summary judgment was entered in error. Accordingly, I would reverse and remand for further proceedings below.

IRVING, P.J., JOINS THIS OPINION.